Supreme Court, U. S.
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IN THE

Supreme Court of the United States

April Term, 1980

No. 79-1584

MARTIN FREDRICK VANGO,

Petitioner,

v.

JAMES P. MITCHELL, WARDEN
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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No.

MARTIN FREDERICK VANGO

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JAMES P. MITCHELL, WARDEN
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR
THE FOURTH CIRCUIT

Petitioner, Martin Frederick Vango, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit rendered in these proceedings on March 10, 1980.

OPINIONS BELOW

The decision of the Virginia Supreme Court, dated the first day of December, 1977, rejecting petitioner's appeal and refusing the Petition for Writ of Error and Supersedeas. The decision of the United States District Court for the Eastern District of Virginia, dated March

20, 1979, rejecting petitioner's Petition for a Writ of Habeas Corpus. The decision of the United States Court of Appeals for the Fourth Circuit, dated March 10, 1980, rejecting petitioner's appeal from the decision of the United States District Court for the Eastern District of Virginia, at Norfolk, denying petitioner's Petition for a Writ of Habeas Corpus. All of the decisions hereinbefore mentioned are included in the Appendix, infra.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was entered on March 10, 1980. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254 (1) and §1257 (3).

QUESTIONS PRESENTED

1. Whether the petitioner, Martin Frederick Vango, was denied due process of law as prescribed by the Fourteenth Amendment to the United States Constitution, in that the trial record and the record of related proceedings in the Circuit Court of the City of Norfolk, Virginia, contain insufficient evidence to justify a rational finder of fact to find the petitioner guilty of the offenses charged beyond a reasonable doubt?

2. Whether the petitioner, Martin Frederick Vango, was denied due process of law under the Fourteenth Amendment to the United States Constitution, by the act of the Circuit Court of the City of Norfolk by denying him a new trial based on after discovered evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 18.2-32 of the Code of Virginia 1950 (1979 Cumm. Supp.):

> §18.2-32. First and Second degree murder, defined; punishment. - Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any wilful, deliverate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery, burglary or abduction except as provided in §18.2-31 is murder of the first degree, punishable as a class II felony.
>
> All murder other than capital murder and murder in the first degree is murder of the second degree is punishable as a class III felony.

(Code 1950, §18.1-21; 1960, C. 358; 1962, C. 42; 1975, CC. 14, 15; 1976, C. 503; 1977, CC. 478, 492.)

STATEMENT OF THE CASE

This case comes to the Supreme Court seeking a review of the decision of the United States Court of Appeals for the Fourth Circuit, dated March 10, 1980, sustaining the decision of the United States District Court for the Eastern District of Virginia, Norfolk Division, denying to petitioner a Writ of Habeas Corpus. On October 19, 1976, after a three day jury trial in the Circuit Court of the City of Norfolk, Virginia, the petitioner was found guilty of two counts of murder in the first degree and of one count of murder in the second degree. He was sentenced to two life terms and a term of twenty years on his convictions. Based upon after discovered evidence that one of the Commonwealth's witnesses may have committed perjury, the petitioner sought a new trial. On May 3, 1977, an evidenciary hearing was held in the Circuit Court of the City of Norfolk, Virginia and the petitioner's motion for a new trial was denied.

On April 18, 1977, prior to his motion for a new trial, the petitioner filed a Petition for a Writ of Error and Supersedeas in the Supreme Court of Virginia. Subsequent to the Circuit Court's decision denying his new trial based upon after discovered evidence, the petitioner filed an amended Petition for a Writ of Error and Supersedeas in the Supreme Court of Virginia, assigning as an additional error the denial of the motion for

a new trial based upon after discovered evidence. On December 1, 1977, the Supreme Court of Virginia denied the original and amended Petitions for a Writ of Error and Supersedeas.

On December 12, 1978, a Petition for a Writ of Habeas Corpus was filed in the United States District Court for the Eastern District of Virginia, Norfolk Division. Thereafter, by memorandum order dated March 20, 1979, the petitioner's Petition for a Writ of Habeas Corpus was denied and dismissed. The petitioner then sought review of the decision of the United States District Court for the Eastern District of Virginia, Norfolk Division, in the United States Court of Appeals for the Fourth Circuit. By an unpublished decision dated March 10, 1980, the Court of Appeals sustained the decision of the District Court from which decision the petitioner now seeks review in the Supreme Court of the United States.

STATEMENT OF THE FACTS

On June 2, 1976, at 1:00 o'clock p.m., Inell Womack and her two children, Jeffrey and Tina, were found strangled to death in their apartment located in the Palms Apartments, 9500 block of Shore Drive, Norfolk, Virginia. Shortly thereafter, the deceased's husband, Eugene Womack, was taken into custody and charged with the murders. Thereafter, on June 3, 1976, based upon information provided to the police by Barbara Strickland, the petitioner, was picked up for questioning and eventually charged with the murder of Inell Womack and her two children.

The evidence produced at trial established that on the afternoon of May 31, 1976, the deceased, Inell Womack and her two children were in their apartment at the Palms Apartments in the Ocean View section of Norfolk. During that afternoon, she was visited by Sharon Freeman, Donna Spain, the resident manager of the Palms Apartments, and the petitioner. The petitioner remained at the apartment for a short while. While he was there, it was agreed between Mrs. Womack and the petitioner that he would return to her apartment at 11:00 o'clock a.m. on the following day, June 1, 1976, and take her and Mrs. Freeman to purchase food stamps. Later that same day, May 31, 1976, at approximately 8:40 o'clock p.m., Mrs. Freeman returned to Mrs. Womack's apartment to bring her a pair of shoes for Jeffrey. At that time, Mrs. Womack and the children were dressed in their nightclothes and the apartment appeared to be in order. Thereafter, on that same night, some time between 9:30 o'clock and 9:45 o'clock p.m., the deceased's estranged husband, Eugene Womack, visited her and the children at the apartment. During the course of his visit, Mr. Womack left the apartment to go to a local convenience store where he purchased lollypops for the children and a six-pack of beer for himself. At the trial, Mr. Womack testified that after returning to the apartment, he attempted to engage in sex with his wife but he was unable to do so. According to his testimony, he left the apartment at approximately twenty minutes to one on the morning of June 1, 1976.

The witness, Barbara Strickland, testified that some time between 8:00 o'clock and 8:30 o'clock a.m. on the morning of June 1, 1976, she saw the

petitioner drive up and park in the Palms Apartments' parking lot; she further testified that there was nothing unusual in his conduct or in the manner in which he had driven his automobile; in addition, she testified that she had seen him at the apartment in the past and that his demeanor this time was no different than at any other time; for some reason which she could not explain, she stated that his presence caused her to feel suspicious. She testified that she hid behind an automobile in the parking lot and watched his activities. According to her testimony, the petitioner went to Mrs. Womack's door, knocked upon it and that Mrs. Womack opened the door dressed in her nightgown. According to Mrs. Strickland, the petitioner remained in the apartment between five and fifteen minutes. She stated that while he was inside the door, that the door was cracked. However, it was pointed out by the defense that this testimony was in conflict with the testimony she had presented at the preleminary hearing that the door was completely closed. According to Mrs. Strickland's testimony, While the petitioner was inside the apartment, she heard arguing, noises and a little squeal. Again, this testimony was shown to be in conflict with testimony she had given at the preleminary hearing concerning whose voices she heard etc. She further testified that petitioner emerged from the apartment, picked up a piece of clothesline, and a block of wood and then returned to the apartment. However, it was proven at trial that the victims were strangled with wearing apparel and although Mrs. Womack had been struck with a blunt instrument, that instrument was not identified. Mrs. Strickland testi-

fied that while Vango was in the apartment the second time, she did not hear any further arguing from the apartment. According to Mrs. Strickland, the petitioner remained in the Womack apartment approximately ten to fifteen minutes and as he left he slammed the door. Mrs. Strickland further testified that after watching the petitioner get in his car and drive away, that she remained in a hidden position for approximately ten minutes. Although she stated that she had had a premonition that something was going to happen, she did not approach the apartment, knock on the door or telephone or make any efforts to ascertain whether Inell Womack and her children were o.k. In fact, even though she became aware of the murders during the afternoon of June 2, 1976, she did not advise the police of what she claims to have seen and heard until June 3, 1976.

Although the petitioner denied being at the Womack apartment early in the morning on June 1, 1976, he did admit that he went to the Womack apartment on June 1, 1976 between 10:30 and 11:15 o'clock a.m., in accordance with his agreement that he would pick her up and take her to purchase her food stamps. This testimony was corroborated by Lionel Spain, who testified that he observed the petitioner on Pretty Lake Avenue, a route for rear access to the Palms Apartments, at approximately 10:30 o'clock to 11:00 o'clock a.m. on June 1, 1976. In addition, Barbara Walton, a neighbor of the Womacks, testified that she saw the defendant knocking on Mrs. Womack's apartment door at approximately 10:30 o'clock or 11:00 o'clock a.m. on June 1, 1976, that they had exchanged greetings, and that Mrs. Womack did not

answer the door. She then observed him get into his automobile and drive away. In addition, Mrs. Walton testified that she had not heard any kind of disturbance earlier in the morning between the hours of 8:00 o'clock and 8:30 o'clock a. m. of June 1, 1976. On the morning of June 2, 1979, Donna Spain knocked on Mrs. Womack's door and did not receive an answer. At approximately 1:00 o'clock p.m., she returned to Mrs. Womack's apartment to retrieve a cooking pot that she had loaned to Mrs. Womack and when she did not receive a response to her knock, she used her master key and opened the door. She found the interior of the apartment to be in disarray and found Mrs. Womack and the children, Jeffrey and Tina, lying on a bed in the bedroom with articles of children's wearing apparell around their necks. The children were dressed in their nightclothes but Mrs. Womack was lying naked upon the bed with an inverted nightgown covering her body. According to the pathologist's testimony, the bodies were in an early state of post mortem decomposition, and that the time of death was approximately eighteen to thirty-six hours before the discovery of the bodies. In addition, the pathologist testified that Mrs. Womack had a hemorrhage approximately two inches in diameter in the right temporalis muscle which could have been caused by a blunt instrument. In addition, the pathologist testified that Mrs. Womack was four months pregnant and that he had found sperm in her vagina.

A Forensic scientist appeared on behalf of the Commonwealth, testified that she had analyzed body hair, pubic hair and sperm samples from the petitioner but that these samples had proved to be

negative.

The Commonwealth also presented the testimony of Sandy Nelson who stated that sometime in early May Vango had indicated to him in general conversation that he and Mrs. Womack were not getting along very well; that he knew she was using him, and that she was asking for trouble.

In addition, the Commonwealth presented as rebuttal the testimony of Anthony George Kelly Carroll that sometime in late March. 1976, he heard Vango call Mrs. Womack " a white bitch ", and also heard him state that she was messing around on him and that he would do something to straighten that out.

The defendant, Vango, testified that he had known the deceased, Inell Womack, since 1974, when he met her in a beer tavern, but that he did not become intimate with her until the early part of April, 1976, when they went to a motel. Vango denied that he was ever intimate with Inell Womack at her apartment and stated that he and Inell stopped having sex together on May 4, 1976 because "Inell said she felt unconfortable having sex in the condition she was in. So we both agreed on the condition that we wouldn't try to bother each other or try to upset each other at that point" Vango testified that it did not make him angry that Inell did not want to have sex anymore nor did they argue about it.

Vango presented the testimony of twelve witnesses, including his ex-wife, all of whom testified that he had a good reputation for being truthful and peaceful, was a good father and got along well

with children. In addition, Vango helped Mrs. Womack move from one apartment to another and gave her money to help with her rent. While Vango acknowledged having a nervous condition and took medication, he was stable and did not have violent tendencies.

Throughout the proceedings Vango consistently and continuously denied any involvement in the homicides of Mrs. Womack and her children

ARGUMENT

I. That there was insufficient evidence, as a matter of law to sustain a guilty verdict beyond a reasonable doubt.

The due process clause of the fourteenth Amendment to the United States Constitution, prohibits the conviction of an accused unless his guilt has been established beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068, 51 Ohio Ops.2d 323 (1970). In the instant case, the circumstantial evidence relied upon by the respondent was, as a matter of law, insufficient to prove him guilty of the crimes alleged beyond a reasonable doubt. The holding in Winship was amplified and explained in the case of Jackson v. Commonwealth, ____U.S.____ 61 L.Ed.2d 560, 99 S.Ct.____, 47 LW 4883 (No. 78-5283, 1979). The courts, including the Fourth Circuit Court of Appeals, continued to apply the no evidence test espoused in Thompson v. Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960). The no evidence test allowed the courts to sustain convictions if they could find so much as a scintilla of evidence to support the verdict.

In rejecting the continued application of the no evidence test, the Court in Jackson held that:

> "The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive Constitutional standard must also

require that the factfinder will rationally apply the standard to the facts in evidence. A reasonable doubt at a minimum is one based upon reason. Yet a properly instructed jury may occasionally convict even when it can be said that no trier of fact could find guilt beyond a reasonable doubt. . . . It follows that when such a conviction occurs in a state trial, it cannot Constitutionally stand." Jackson, supra, pp. 571, 572.

The inquiry to be made is whether or not the record reveals a sufficient amount of evidence from which a jury could reasonably reach a guilty verdict. Looking at the evidence in the light most favorable to the prosecution, could any trier of fact find all of the essential elements of the crime to be present beyond a reasonable doubt. Jackson, supra, p. 573. Applying the Jackson standard to the instant case, it is apparent that the evidence placed before the jury was insufficient to find the petitioner guilty beyond a reasonable doubt. The prosecution paraded witness after witness before the jury, none of whom were able to state more than that they had seen the petitioner at the victims' apartment during the two day period prior to the discovery of their bodies. If believed, the prosecution's strongest witness stated that she saw the petitioner enter the victims' apartment a day and one-half before the discovery of their bodies. She also stated that she heard them argue and that she saw the petitioner leave the apartment, and return with a piece of wood and some rope, only to leave shortly thereafter.

Her testimony is the most critical in the jury's finding the petitioner guilty of the slayings.

What the prosecution did was to create suspicion through inference. Rope was not used in the commission of the crime. There is no evidence that a block of wood was used. No witness saw the petitioner leave the apartment with a piece of wood or rope. None was found by the police. No jury could have reasonably considered this evidence sufficient to convict the petitioner beyond a reasonable doubt. Although it has been held that a verdict based wholly upon circumstantial evidence is valid, Higginbotham v. Commonwealth, 216 Va. 349 (1975), ". . . suspicion or even probability of guilt is not sufficient. There must be an unbroken chain of circumstances proving the guilt of the accused to the exclusion of any other rational hypothesis and to a moral certainty." Gordon v. Commonwealth, 212 Va. 298, 300, 183 S.E.2d 735, 736.

In Gordon, the defendant was observed by a policeman carrying a brown manila evelope. The policeman began to follow and eventually gave chase by automobile and then on foot. The defendant ran down alleyways. On two occasions, the officer lost sight of the defendant for three or four seconds. On one of these occasions, the defendant ran into a dead end at locked gate and was apprehended. The arresting officer did not find the envelope either on the defendant or on the path they had covered during the chase. Another officer, retracing their steps, found a brown manila envelope behind the locked gate. The envelope contained drugs and drug paraphernalia. The defendant's conviction was

reversed as being based upon insufficient evidence. The prosecution had failed to establish an unbroken chain of events, that is, they were unable to demonstrate the continued possession of the envelope by the defendant.

In a similar case, a man was arrested in the basement of an abandoned house for possession of drugs. The next day, the police returned to the house and found other drugs and related paraphernalia in the basement. In reversing the defendant's conviction, the court held:

> ". . .The drugs and paraphernalia · · · were incapable of affording any reasonable presumption of inference on matters in issue, because too remote, since the ruins were not guarded during the time which elapsed between arrest and search. The ruins were accessible to many people, any of whom could have hidden the contraband either before or after Olsen's arrest." Olsen v. Commonwealth, 212 Va. 545, 546, 186 S.E.2d 51, 53, citing Gordon, supra.

In analyzing Olsen and Gordon, certain principles evolve. They are as follows:

(a) Suspicion or probability are not sufficient to sustain a finding of fact;

(b) There must be an unbroken chain of circumstances which establish guilt;

(c) This unbroken chain of circumstances must prove guilt to the exclusion of any other rational hyphothesis; and

(d) To a moral certainty.

When we apply these principles to the facts in the instant case, we fall far short of establishing guilt beyond a reasonable doubt. As previously stated, the prosecution's case was built upon suspicion and probability. From the record, the victim's husband could have been convicted as easily by making similar accusations against him. The chain of events is not unbroken. Only one witness, whose credibility was in issue based upon her reputation, and upon inconsistencies between her testimony at the preliminary hearing and at the trial, claims to have seen the petitioner with the victims during the 2 days preceding the discovery of their bodies. The pathologist could only state that they had died between 18 and 36 hours before their bodies were discovered. Just as in Olsen, there was no guard at the door to see who came and went during all of that time. Only one witness claims to have seen the petitioner with the victims, and that was a day and one-half before their bodies were discovered. There was another 18 hours during which the crime could have been committed. The apartment was accessible to many people during that time. Any of whom could have committed the crime.

Another of the Olsen/Gordon standards which is not met, is that the crime occurred as alleged, to the exclusion of any other rational hyphothesis. When Mrs. Womack was found, she was lying naked on the bed covered

by a nightgown turned inside out. A medical examination also revealed that semen was present in her vagina. In addition to having been strangled, she had been struck on the head by a blunt instrument. The possibility that Mrs. Womack was raped and murdered is very real. A sample of the petitioner's semen and pubic hairs prove that the petitioner had not had sexual relations with the decedent. This raises the possibility of her having another visitor before she died. From the testimony at the trial, Mrs. Womack's estranged husband had visited her the evening before the alleged visit by the petitioner. He did not like the petitioner and the petitioner's relationship with Mrs. Womack. Mr. Womack is alleged to have direct a racial slur at the petitioner. Given all of these possibilities, it is impossible to exclude any other rational hypothesis.

> "When the evidence is wholly circumstantial, as here, all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence. The chain of necessary circumstances must be unbroken · · · The burden is upon the Commonwealth to prove beyond a reasonable doubt that motive, time, place, means, and conduct incur in pointing out the accused as the perpetrator of the crime." Underwood v. Commonwealth, 218 Va. 1045, 243 S.E.2d 231, 232 (1978), citing Inge v. Commonwealth, 217 Va. 360, 366, 228 S.E.2d 563, 567-568 (1976).

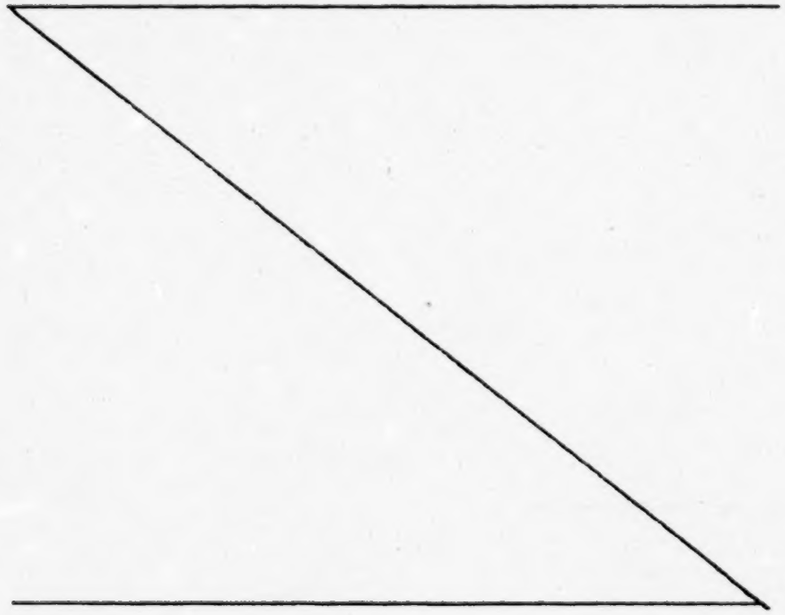
In the instant case, the prosecution has failed to prove any of these things. With respect to motive, the only evidence which exists is that the petitioner and Mrs. Womack may have had an argument. That is hardly motive for murder. Time was never established. The murders occurred between 18 and 36 hours before the bodies were discovered. The petitioner and many others visited the Womack apartment during that time, and all would have had access to the same means. With the exception of one witness who claimed the petitioner seemed angry upon leaving the Womack apartment, there were no other reports of any unusual conduct by the petitioner.

> "It is required under our system of law that before life or liberty is exacted the evidence shall leave no reasonable doubt of the defendant's guilt · · · circumstances of suspicion, no matter how grave or strong, are not proof of guilt sufficient to support a verdict of guilty. The actual commission of the crime by the accused must be shown by evidence beyond a reasonable doubt to sustain his conviction." Crisman v. Commonwealth, 197 Va. 17, 21, 87 S.E.2d 796, 799 (1955).

In the instant case, the commission of the crime by the petitioner was not shown beyond a reasonable doubt and, therefore, his conviction should be reversed.

II. The petitioner was denied due process of law on the ground that he was denied a new trial on after-discovered evidence.

The law in Virginia on granting a new trial based upon after-discovered evidence is well-settled. As a general rule, when the after-discovered evidence is that a witness has committed perjury, the standard is that if the defendant could not have been convicted without the use of that perjured testimony, then a new trial will be granted. However, if after eliminating the perjured testimony, there would still be sufficient evidence to sustain the verdict, a new trial will be denied. Powell v. Commonwealth, 133 Va. 741, 112 S.E. 657 (1922); Leigh V. Common-



wealth, 192 Va. 583, 66 S.E.2d 586 (1951). In addition, it has been held that the granting of a new trial based upon after-discovered evidence is within the sound discretion of the Court and will not be reversed unless a clear abuse of that discretion is shown. Edgar v. Finley, 312 F.2d 533, 537 (1963).

We believe the facts in the instant case are such that if allegedly perjured testimony were deleted from a subsequent trial, the suspicion and innuendo upon which the Commonwealth built its case would be insufficient to sustain a finding of guilt. As the record will reveal, the defense painstakingly demonstrated, through the use of character witnesses, the peaceful and non-violent nature of the petitioner. The Commonwealth produced a rebuttal witness, one Anthony George Kelly Carroll. Mr. Carroll testified that sometime between March 25 and March 31, 1976, he heard the petitioner call Mrs. Womack "a white bitch". In addition, Mr. Carroll testified that he witnessed an argument between the petitioner and Mrs. Womack which served to refute the defenses' claim that the petitioner and Mrs. Womack were on good terms. In addition, Mr. Carroll testified that the substance of the argument was as follows, "she was messing around on him and that she would do . . . he would do something to straighten that out. You know, he would take care of it."

Sometime after the trial, two witnesses contacted the petitioner's defense counsel and informed him that Mr. Carroll had told them that he had committed perjury. On May 3, 1977, a hearing was held on the defense motion for a new trial based upon this newly discovered evidence. At that

hearing, a Mr. Laverne P. Sweat testified that Mr. Carroll told him in December, 1976, that he, Carroll, was an ex-boyfriend of Mrs. Womack's, and that he knew that the petitioner had not killed her, and that "her husband was a very good friend of mine and he paid me $250.00 to testify against this Vango". In addition, Mr. Sweat further testified that Mr. Carroll told him that he had needed money and that Eugene Womack had helped him out before. Although Mr. Sweat is a convicted felon, he did not know the petitioner and only stepped forward because he felt that having the petitioner sentenced to jail for life based upon such testimony was unconscionable.

In addition to Mr. Sweat's testimony, a Mr. Lloyd J. Ange, Jr., testified that Mr. Carroll had also told him that he knew that the petitioner was not guilty and that Mr. Carroll had told him that "he knew this other dude that was supposed to have killed the girl and all that". Like Mr. Sweat, Mr. Ange is also a convicted felon but he too had no prior acquaintance with the petitioner, and no ulterior motive for stepping forward.

If Mr. Carroll's testimony was, in fact, perjured, the Commonwealth's case would be substantially weakened. So much so, that it can not be said with any degree of certainty that without his testimony the petitioner would have been convicted. Of all the witnesses who testified, only two offered any evidence which might be considered adverse to the petitioner. The first witness was Barbara Strickland. However, her testimony standing alone may not have been believable. The defense demonstrated through its cross-examination

of Mrs. Strickland, that obvious inconsistencies existed between statements she had given at a preliminary hearing and testimony she was giving at the trial. These inconsistencies were never explained. In addition, the testimony seemed tailored to fit the circumstance. Mrs. Strickland's testimony was also attacked by a witness who testified for the defense, that Mrs. Strickland's reputation in the community for truthfulness was not good. The only other witness who provided testimony which was potentially damaging to the petitioner was Mr. Carroll. Mr. Carroll testified after a long line of defense witnesses, all of whom testified to the good reputation and character of the petitioner for truthfulness and non-violence, and after the petitioner himself. In his rebuttal testimony, Mr. Carroll cast doubt as to the veracity of the statements and opinions held by the character witnesses for the defense.

The record will reveal that the Jury encountered some difficulty in reaching a decision as to the petitioner's guilt or innocence. Barring Mr. Carroll's testimony, it is likely that it would have resulted in either an acquittal or a hung jury. Therefore, we move that the Supreme Court reverse the Trial Court's refusal to grant a new trial based upon after-discovered evidence, as an abuse of its discretion, and therefore a denial of due process.

CONCLUSION

Petitioner respectfully requests that this Court grant a writ of certiorari for

the above reasons.

Respectfully submitted,

MARTIN FREDERICK VANGO

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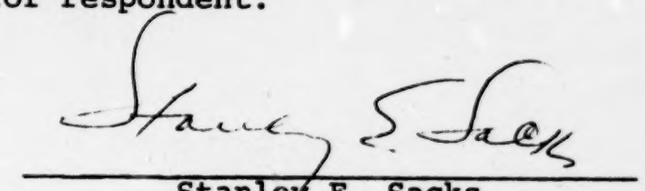
CERTIFICATE OF SERVICE

I, Stanley E. Sacks, counsel for petitioner in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 9th day of April, 1980, I mailed three copies of the foregoing Petition For Writ of Certiorari to Joseph H. Campbell, Commonwealth's Attorney, City of Norfolk, Suite 600, 800 E. City Hall Avenue, Norfolk, Virginia 23510, counsel of record for respondent.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APPENDIX A

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON THURSDAY THE FIRST DAY OF DECEMBER, 1977.

The petition and amendment thereto of Martin Frederick Vango, sometimes known as Martin Vango, for a writ of errer and supersedeas to judgments rendered by the Circuit Court of the City of Norfolk on the 20th day of December, 1976, in prosecutions by the Commonwealth against the said petitioner for felonies (Indictments Nos. 1, 2 and 3), having been maturely considered and a transcript of the record of the judgments aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgments complained of, doth reversible error in the writ of error and supersedeas, the effect of which is to affirm the judgments of the said circuit court.

Record No. 770504 A Copy,
Teste:

Allen L. Lucy, Clerk

By: /S/ Richard R. Brunick
Deputy Clerk

Received this 5th day of December, in the year 1977, from the Supreme Court of Virginia and is here entered of record.

Enter: December 5, 1977

Alfred W. Whitehurst, Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

MARTIN FREDERICK VANGO,
#109868,
Plaintiff,
v.

TERRELL DON HUTTO,
Director of Virginia Department of Corrections,
Respondent,
and

T. MARSHALL COLEMAN,
Attorney General for the Commonwealth of Virginia,
Respondent,

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254

COMES NOW the petitioner, by counsel, and states unto this Honorable Court as follows:

1. That the petitioner is currently incarcerated in the Virginia State Penitentiary located at 500 Spring Street in the City of Richmond, Virginia, pursuant to a judgment of conviction entered by the Circuit Court of the City of Norfolk, Virginia, on December 20, 1976.

2. That the Honorable Alfred W. Whitehurst presided during the trial of the petitioner for three indictments alleging murder.

3. That in spite of the fact that there was no evidence of your petitioner's guilt, your petitioner was found guilty of first degree murder of one Tina Womack and received a sentence of life imprisonment; that your petitioner was found guilty of first degree murder of one Jerry Womack and received a sentence of life imprisonment; and that your petitioner was found guilty of second degree murder of one Inell Womack and received a sentence of twenty years in the Virginia State Penitentiary.

4. That your petitioner pleaded not guilty to each of the indictments and received a trial by jury for each of the three indictments.

5. That your petitioner filed a petition for writ of error and supersedeas in the Supreme Court of Virginia on April 18, 1977.

6. That after filing the petition for writ of error and supersedeas with the Supreme Court of Virginia, the petitioner moved the Circuit Court of the City of Norfolk for a new trial based upon after-discovered evidence indicating that one of the prosecution's witnesses had perjured himself during the course of the trial.

7. That on May 3, 1977, an evidentiary hearing was held in the Circuit Court of the City of Norfolk before the Honorable Alfred W. Whitehurst pursuant to your petitioner's motion for a new trial on the grounds of such after-discovered evidence; and that your petitioner's motion was overruled.

8. That thereafter, your petitioner filed an emended petition for writ of error and supersedeas with the Supreme Court of Virginia including the

petitioner's motion for a new trial based upon after-discovered evidence.

9. That on the st day of December, 1977, the petitioner's amended petition for writ of error and supersedeas was denied by the Supreme Court of Virginia without granting your petitioner a direct review of any of the proceedings of the Circuit Court; that your petitioner has never been afforded a direct review or direct appeal of his convictions; has never been afforded an opportunity for full and fair litigation of his claims of denial of due process as guaranteed by the Constitution of the United States of America as hereinafter described.

10. That your petitioner has exhausted the remedies available to him in the Court of the Commonwealth of Virginia and is nevertheless still in custody of the respondents in violation of the Constitution and laws of the United States of America; your petitioner has no right under the law of the Commonwealth of Virginia to raise by any available procedure, the questions of his illegal and unconstitutional detention presented herein.

11. That your petitioner charges that he is being held unlawfully and in violation of the Constitution and laws of the United States of America for the following reasons and for each of said grounds your petitioner has exhausted all possible State Court remedies with respect to each of such grounds.

A. Ground one: Your petitioner was denied due process of law guaranteed by the Fifth and Fourteenth amendments to the Constitution of the United States of America in his trial in the Circuit Court of the City of Norfolk, in the

Commonwealth of Virginia for the following reasons:

(a) the record of your petitioner's trial and related proceedings in the said Circuit Court, in which the determination was made that he was guilty of the murder of Tina Womack, Jerry Womack and Inell Womack, clearly demonstrates and establishes that there not only was insufficient, and, in fact, no evidence to support any such factual determination of the commission of the murders, or any of them, by your petitioner.

There is produced herewith as an appendix to the petition and incorporated herein by this reference the record of said trial proceedings which your petitioner alleges are wholly insufficient and totally devoid of any evidence of the commission of any crime on the part of your petitioner; your petitioner prays that this Court, on a consideration of the record as a whole, conclude that such factual determination that your petitioner committed any or all of said murders is not fairly supported thereby.

(b) On May 3, 1977, your petitioner presented evidence in his behalf in support of a motion for a new trial on the ground that your petitioner had found after-discovered evidence that clearly established and proved that a prosecution witness, one Anthony Carroll, had, in fact, committed perjury at the trial of your petitioner's case and that such evidence of perjury could not have been discovered by your petitioner even in the exercise of due diligence.

At such hearing, two witnesses were proffered. One Laverne Sweat testified that the witness, Carroll, had

stated to him that in December, 1977, that the decedent, Inell Womack, was his ex-girlfriend. The said Carroll further stated to this witness that he, Carroll, had received $250.00 from the decedent's husband in exchange for his testimony against your petitioner.

A second witness, one Lloyd J. Ange, Jr., also testified at said hearing. He corroborated Sweat's testimony that Carroll spent a period of time with Sweat; he also engaged Carroll in the conversation relating to your petitioner's trial and this witness stated that Carroll told him, Ange, that "the guy (Vango) is not even guilty"; Carroll stated that he knew that "this other dude was supposed to have killed the girl".

Although said evidence was unrefuted, the Trial Court refused to set aside the verdict of the Jury and grant your petitioner a new trial; and the Supreme Court of Virginia refused to grant an appeal and directly review the claim by your petitioner, that his conviction was obtained with perjured testimony.

B. Count two: Your petitioner was denied a right of appeal and direct review of his conviction.

Your petitioner, pursuant to the provisions and law of the Commonwealth of Virginia and the rules of the Supreme Court of Virginia did file a petition for writ of error and supersedeas in the Supreme Court of Virginia on April 18, 1977, setting out, inter alia, the following assignments of error committed by the trial Court.

In addition, as alleged above, your petitioner filed an amended petition for writ of error and supersedeas with said Supreme Court of Virginia which assigned

as additional error the denial of petitioner's motion for a new trial based upon after-discovered evidence.

On, to-wit, the 1st day of December, 1977, your petitioner's petitions for a writ of error and supersedeas were denied without direct review by the Supreme Court of Virginia fo the aforementioned convictions and sentences; that the sentences, which are the bases of your petitioner's custody and detention have never been the subject of direct review by the Supreme Court of Virginia.

C. Ground three: Your petitioner's conviction was obtained in violation of the guarantee of the Sixth Amendment to the Constitution of the United States that he shall be confronted with the witnesses against him.

Although sixteen witnesses were presented by the prosecution at your petitioner's trial the Commonwealth by and through its prosecution failed to present a single witness who saw or claimed that they witnessed your petitioner commit the crimes of which he was convicted; the prosecution failed to confront your petitioner with a single witness who so testified and your petitioner has thereby been denied his constitutional right of confrontation by witnesses against him.

In addition, the effect of the rule of law and practice and procedure of the Commonwealth of Virginia applied against your petitioner, as defined in Payne v. Commonwealth 216 Va 265, 217 S.E. 2d 870 (1975), to-wit, that circumstantial evidence may be sufficient to support a verdict of guilty of the commission of a crime, where motive, time, place, means and conduct concur in pointing out the

accused as a perpetrator of a crime, is to deny an accused and your petitioner his Sixth amendment right of confrontation; that such rule and procedure was utilized in the proceedings and applied against your petitioner effectively denying him his Sixth amendment guarantee of the right to be confronted by his accusers and witnesses against him. The application of such rule also constitutes a denial of due process guaranteed your petitioner by the Constitution of the United States of America.

D. Ground four: That your petitioner did not receive a full, fair and adequate hearing in the Circuit Court of the City of Norfolk in the Commonwealth of Virginia based upon the following grounds:

(a) Because no direct review, on appeal, was granted or had, of the factual determination by the Trial Court of the commission of any crime by your petitioner.

(b) That no such direct review on appeal was granted on the factual determination by the Trial Court that a material witness for the prosecution, to-wit, Carroll, did not perjure himself as alleged and contended by your petitioner.

(c) Because no direct review, on appeal was granted of the ruling of the Trial Court that your petitioner was not entitled to a new trial on the grounds of after-discovered evidence.

12. That your petitioner has no petition or appeal pending in any Court, either State or Federal, relating to the judgment which your petitioner seeks to attack.

13. That your petitioner was represented at all stages in the State Court by William P. Robinson, Jr.,

Esquire, of the law firm of Mason & Moore, Suite 1612, 101 St. Paul's Boulevard, Norfolk, Virginia 23510.

14. That your petitioner was convicted and sentenced pursuant to three separate indictments tried in the same Court on the same date.

15. That your petitioner has no future sentence to serve upon the completion of the judgment addressed herein.

WHEREFORE, your petitioner prays that you grant him supersedeas and that relief for which he may be entitled pursuant to this proceeding.

MARTIN FREDERICK VANGO

By /s/ Stanley E. Sacks
Of Counsel

Stanley E. Sacks, Esquire
SACKS & SACKS
405 F & M National Bank Building
Norfolk, Virginia 235 0

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

MARTIN FREDERICK VANGO, #109686,]
]
Petitioner,]
v.] MISC. NO.
] 78-647-N
JAMES P. MITCHELL SUPERINTENDENT]
OF THE VIRGINIA STATE PENITENTIARY,]
]
Respondent]

MEMORANDUM ORDER

Petitioner, a state court prinsoner, filed a petition for a writ of habeas corpus on January 8, 1979, respondent filed his motion to dismiss.

Petitioner was convicted, after his not guilty pleas and a three day jury trial, on October 19, 1976 in the Circuit Court of the City of Norfolk for the crimes of murder in the first degree, murder in the first degree, and second degree murder. He was sentenced to terms of life, life and twenty (20) years respectively, on December 20, 1976 after a presentence report.

A motion to set aside the verdicts as being contrary to the law and the evidence was overruled on October 19, 1976.

On November 5, 1976 defense counsel appeared before the court and requested a presentence report which was granted.

Petitioner then sought a new trial on grounds of after discovered evidence. This motion was denied on May 3, 1977.

The trial court was affirmed December 1, 1977.

The allegations of the instant petition charge:

(1) Insufficiency of the evidence;
(2) Commonwealth witnesses committed perjury and petitioner was entitled to a new trial;
(3) Denial of right of appeal;
(4) Denial of right of confrontation; and
(5) Denial of full and adequate appeal.

This Court has before it the 158 page, 218 page, 198 page and 9 page transcripts encompassing the original trial, together with the 12 page transcript request for presentence report of November 5, 1976, and the 28 page transcript on the presentence report, and the 37 page transcript of May 3, 1977, on motion for a new trial.

Petitioner has exhausted his state court remedies only as to allegations (1) in conformity with 28 U.S.C. §2254, but not as to allegations (2), (3), (4) and (5).

As to allegations (1), petitioner is entitled to habeas corpus relief only if the record is totally devoid of evidentiary support. Williams v. Peyton, 414 F.2d 776 (4th Cir. 1969).

It is conceded that from the voluminous transcripts that there were no witnesses to the three homicides and the evidence was circumstantial evidence. Under such cir-

cumstances the evidence need not affirmatively disprove all the theories which might negate the conclusion that the defendant killed the deceased, but the convictions would be sustained if the evidence excludes every reasonable hypothesis of innocence. Higginbotham v. Commonwealth, 216 Va. 349, 218 S.E.2d 534 (1975). From the transcript, there was shown motive, and there had been arguments between petitioner and Irell Womach, one of the victims, mother of Jeffrey, 2-1/2 years of age, and Tine, 13 months of age, the other two victims. Petitioner admitted intimacies with Womach at a motel and at her apartment. Although petitioner testified he was at his own apartment asleep at 8:00 A.M., June 1, 1976, a witness who occupied an apartment in the same building as Womach testified she saw Vango come to the parking lot of the apartments and enter Womach's apartment and saw Womach in a gown just inside the door. Shortly thereafter petitioner and Womach argued loudly. It became quiet and petitioner exited, appearing angry according to the witness, got into his car and left. The bodies of the victims were discovered on June 2, 1976. The two deceased children had been strangled, Mrs. Womach had been struck with a blunt instrument on the right side of her head. Death of each was testified to by Dr. Charles Springate, pathologist, as having been within the period of 18 to 36 hours. The jury judged the credibility of the numerous witnesses. There is no merit in this allegation of insufficient evidence.

Petitioner has not exhausted his state court remedies as to "perjured" testimony. Even if petitioner had exhausted his state court remedies, he would not be entitled to relief. Conflicts between the prosecution witnesses and petitioner's own testi-

mony does not amount to "perjury". Thompson v. Garrison, 516 F.2d 986 (4th Cir. 1975). There is no merit in this allegations.

As to allegation (3) that petitioner was denied his right of appeal, the records reflect otherwise. The Supreme Court of Virginia, in its order of December 1, 1977, stated, "· · · being of the opinion that there is no reversible error in the judgments complained of, doth reject said petition and refuse said writ of error and supersedeas · · · ." There is clearly no merit in this allegation.

In allegation (4), suggestive of a lack of confrontation, petitioner appears to claim that his convictions could not be based on circumstantial evidence. While there has been no exhaustion of state court remedies, nevertheless the allegation does not constitute denial of due process or any other constitutional violation. "Where the jury may draw inferences from circumstantial evidence, it may convict even though such evidence does not exclude every reasonable hypothesis consistent with innocence." United States v. Bobo, 477 F.2d 974 (4th Cir. 1973); United States v. Chappell, 353 F.2d 83 (4th Cir. 1965). There is no merit in this allegation.

Charge (5) is the same as allegation (3), discussed in this Order. Petitioner seems to claim that he would be entitled to a "full hearing" before the Supreme Court of Virginia. The allegation is frivolous.

It is ORDERED that the petition be and hereby is, DNIED and DISMISSED in conformity with this Order.

The petitioner may appeal from this final order by forwarding a written notice of appeal with the Clerk of this Court, Post Office Box 1318, Norfolk, Virginia 23501, and paying the filing fee of $5.00, within thirty (30) days. For the reasons above stated, the Court declines to issue a certificate of probable cause.

The Clerk is directed to forward copies of this Order to the Attorney General of Virginia, the Clerk of the Circuit Court of the City of Norfolk, the respondent and to the petitioner. A copy of this Order shall also be forwarded to Stanley E. Sacks, Esquire, attorney for the defendant.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia

March 20, 1979

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

MARTIN FREDERICK VANGO,

Petitioner,

v.

JAMES P. MITCHELL, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Respondent.

*

*

* MISCELLANEOUS

* NO. 78-647-N

*

NOTICE OF APPEAL

NOTICE is hereby given that Martin Frederick Vango, Petitioner in the above-styled matter, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Final Judgment Order of this Court entered on March 20, 1979, denying and dismissing the Petition for a Writ of Habeas Corpus filed by the Petitioner herein.

MARTIN FREDERICK VANGO

By /S/ Stanley E. Sacks
Of Counsel

Stanley E. Sacks, Esquire
SACKS, SACKS, & PERKINS
405 F & M National Bank Building
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal has this day been forwarded to Linwood T. Wells, Jr., Assistant Attorney General, 900 Fidelity Building, Richmond, Virginia, 23219, counsel for the Respondents in the above-styled matter.

DATED this 13th day of April, 1979.

/S/ Stanley E. Sacks
Stanley E. Sacks

Appendix E

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-6339

Martin Frederick Vango,

Appellant,

v.

James P. Mitchell, Superintendent of the Virginia State Penitentiary,

Appellee.

- - - - -

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

- - - - -

Submitted: January 17, 1980
Decided: March 10, 1980

- - - - -

Before WINTER, BUTZNER and SPROUSE, Circuit Judges.

- - - - -

(Stanley E. Sacks, Sacks & Sacks, for the Appellant. Linwood T. Wells, Jr.,

Assistant Attorney General, for the Appellee.)

Unpublished

PER CURIAM:

Appellant, Martin Frederick Vango, was convicted in a jury trial in the Circuit Court of the City of Norfolk, Virginia, of two counts of first-degree murder and one count of second-degree murder. He was sentenced respectively to two terms of life and one term of twenty years imprisonment. Vango subsequently moved for a new trial based on after-discovered evidence. This motion was denied after an evidentiary hearing. Vango's petition and amended petition for a writ of error and supersedeas[1] were denied by the Supreme Court of Virginia. Thereafter, his petition for a writ of habeas corpus was denied by the United States District Court for the Eastern District of Virginia.

In this appeal, Vango has raised four issues, asserting that: (1) the trial contains insufficient evidence of guilt; (2) the denial of the new trial motion amounted to a denial of due process; (3) he was denied his "right of appeal and full review of his conviction;" and (4) his conviction violated his Sixth Amendment right to be confronted with the witnesses against him. We disagree.

The district court considered the attack on the sufficiency of the evidence of guilt in light of the standard we enunciated in Williams v. Peyton, 414 F.2d 776 (4th Cir. 1969).

1 The amended petition was filed subsequent to the trial court's denial of the motion for a new trial.

Concluding that the evidence was sufficient, the district court stated that Vango "is entitled to habeas corpus relief only if the record is totally devoid of evidentiary support." Subsequent to the district court's decision, however, the Supreme Court announced its decision in Jackson v. Virginia, ___ U.S. ___, 47 U.S.L.W. 4883 (June 28, 1979). There, the Court stated that an applicant "is entitled to haveas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Id. at 4887 (footnote omitted). We have examined the record evidence in light of the Jackson standard and conclude that the evidence of guilt is not constitutionally insufficient. While the evidence was circumstantial[2] and was not overwhelming, we believe that the Commonwealth presented sufficient evidence to permit a rational jury to find guilt beyond a reasonable doubt.

Vango's motion for a new trial was based upon the following circumstances: One of the Commonwealth's rebuttal witnesses, Anthony Carroll, testified at trial that he had heard Vango make threatening statements concerning one of the victims. At the post-conviction hearing on the motion, Vango presented the testimony of two witnesses. The substance of these witnesses' testimony was that Carroll had told them that he knew that Vango had not killed the victims and

2 In Virginia, a jury may return a guilty verdict based wholly upon circumstantial evidence. See, e.g., Higginbotham v. Commonwealth, 216 Va. 349 (1975).

that Carroll had been paid for his testimony against Vango by the husband of one of the victims, who had initially been suspected in the slayings.

We believe that this testimony does not present circumstances that compel a new trial and that, consequently, the denial of the motion for a new trial did not deny Vango due process. While the credibility of Carroll's trial testimony was a factor in the Commonwealth's attempt to establish a motive for the murders, it was not the only testimony presented in that regard. It appears from the record that the Commonwealth presented independent evidence to establish a motive for the murders.

Moreover, the testimony presented at the post-conviction hearing is merely testimony by third parties which challenges the credibility of one of the Commonwealth's witnesses. This attack on the allegedly perjured testimony presents a situation less compelling than an instance in which a witness recants his testimony. Even in the latter situation, we have stated that "(a) habeas corpus petitioner must show that the prosecutor or other government officers knew the testimony in question was false in order to prevail." Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir. 1975). Vango has not asserted the knowing use of perjured testimony, and we accordingly hold that the denial of the new trial motion was not violative of due process.

Vango's third assertion is an attack upon the Supreme Court of Virginia's interpretation of the Constitution and

laws of Virginia. In denying Vango's petition and amended petition for a writ of error and supersedeas, the Supreme Court of Virginia affirmed the judgement of the Circuit Court without oral argument. Vango has asserted that the Constitution of Virginia mandates that a petitioner be granted a writ of error. In Saunders v. Reynolds, 214 Va. 697 (1974), the Supreme Court of Virginia flatly rejected this argument, noting that neither the Constitution of Virginia nor the Fourteenth Amendment to the United States Constitution requires that a writ of error be issued as a matter of right. The Supreme Court of Virginia's interpretation of the Constitution and laws of Virginia is manifestly an issue of state law and is therefore not cognizable in federal court. See Chance v. Garrison, 537 F.2d 1212, 1215 (4th Cir. 1976); Grundler v. North Carolina, 283 F.2d 798, 802 (4th Cir. 1960).

Vango's final assertion is apparently an attempt to equate conviction based upon circumstantial evidence with denial of the Sixth Amendment right to confront witnesses. We find no merit to this argument.

Based on the record and the briefs before the Court, we dispense with oral argument and affirm the judgement of the district court.

AFFIRMED.